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No. 09-535

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

GREGORY J. PAPIERZ,

Petitioner,

v.

SCOTT JACKSON & BRYAN ERGANG,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF IN OPPOSITION

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COUNTER-STATEMENT OF THE ISSUES PRESENTED

(1) WHETHER THE ALLEGED PLANTING OF EVIDENCE ON THE GROUND IN A PUBLIC PLACE WHERE AN INDIVIDUAL HAS NO REASONABLE EXPECTATION OF PRIVACY AND IS NOT ARRESTED NOR CHARGED FOR ANY CRIME ASSOCIATED WITH THE ALLEGED PLANTING OF EVIDENCE VIOLATES THE FOURTH AMENDMENT RIGHT TO BE FREE FROM AN UNREASONABLE SEARCH?

(2) ASSUMING THIS COURT WERE TO CONSIDER WHETHER PLANTING EVIDENCE ON THE GROUND IN A PUBLIC PLACE WHERE AN INDIVIDUAL DOES NOT HAVE A REASONABLE EXPECTATION OF PRIVACY IS A FOURTH AMENDMENT VIOLATION, ARE THE OFFICERS ENTITLED TO QUALIFIED IMMUNITY GIVEN THAT, AS PLAINTIFF CONCEDES, "THIS CASE APPEARS TO BE ONE OF FIRST IMPRESSION?"

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On March 27, 2008, the United States District Court for the Western District of Michigan issued an order granting summary judgment to Respondents Scott Jackson ("Officer Jackson") and Bryan Ergang ("Officer Ergang") (collectively, the "Officers" or "Respondents") (R. 24 – Order, filed 3/27/08).[1] The Order specifically states that summary judgment was granted "on the written and oral arguments of the parties and on all matters of record, and for the reasons articulated at the hearing" (*Id.*). At the summary motion hearing, the District Court "g[a]ve a bench ruling . . . as the opinion of the Court" (R. 26 – Transcript of Motion for Summary Judgment, p. 27; *see also* Appendix A hereto). Thus, while the District Court did not issue a separate written opinion, it did issue a well-reasoned eight (8) page ruling from the bench as "the opinion of the Court" (*Id.* at 27 – 34; Appendix A, pp. 26a-33a).

Upon appeal to the United States Court of Appeals for the Sixth Circuit, the District Court's opinion was affirmed in a unanimous well-reasoned nine-page opinion. *Papierz v. Jackson*, Case No. 08-1522, issued August 3, 2009, 2009 WL 2382189 (6th Cir. 2009) (See Petition for Writ of Certiorari, Appendix A).

[1] This Order has been attached to Petitioner's Petition for Writ of Certiorari ("Petition") as Appendix B. It has not been reproduced in this Brief in Opposition.

COUNTER-STATEMENT OF JURISDICTION

Respondents do not dispute that this Honorable Court, in its discretion, has jurisdiction over the issues raised in the Petition for Writ of Certiorari ("Petition").

Nonetheless, Respondents respectfully state that neither the District Court nor the United States Court of Appeals for the Sixth Circuit erred factually or legally when it granted summary judgment to Respondents. As such, Petitioner has failed to present any "compelling reason" for this Honorable Court to grant certiorari pursuant to Sup. Ct. R. 10.

Accordingly, Respondents respectfully state that for the reasons more fully set forth below, this Court should deny the instant Petition.

COUNTER-STATEMENT OF THE CASE

1. Introduction.

Petitioner brought the instant lawsuit and Petition under a novel legal theory: that the Officers' alleged actions of planting Vicodin on the ground in a public place in an attempt to frame him, without arresting him, violated the Fourth Amendment. This is Petitioner's theory even though it is undisputed that Petitioner: (1) was properly stopped as a result of a traffic offense; (2) was driving with a suspended and expired license (both of which are arrestable offenses under Michigan

law);[2] and (3) was not arrested for any drug-related offense. Petitioner claims that the only reason he was not charged with a drug-related crime was because he fortuitously had a prescription for Vicodin, thus thwarting the Officers attempt to frame him.[3]

The Petition challenges the United States Court of Appeals for the Sixth Circuit's August 3, 2009 Opinion (*see* Petition, Appendix A) affirming the District Court Order dismissing Petitioner's lawsuit in its entirety, holding that Petitioner's allegations of "planting drugs on the ground in a public place did not involve any

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[2] MCL 257.301(1) provides that "a person shall not drive a motor vehicle upon a highway in this state unless that person has a valid operator's or chauffeur's license." MCL 257.904(1) states that "[a] person whose operator's . . . license. . . has been suspended or revoked . . . shall not operate a motor vehicle upon a highway or other place open to the public." MCL 257.904(3)(a) notes that driving on a suspended license is punishable by up to 93 days in prison for a first offense. Similarly, MCL 257.904a specifically notes that drving without a valid license is a misdemeanor punishable by up to 90 days imprisonment. *See also* 257.901 ("It is misdemeanor for a person to violate this act" unless it is otherwise noted to be a felony or civil infraction).

[3] What is left unanswered by Petitioner is why the Officers would attempt to frame him by "planting" Vicodin on the ground, as opposed to on Petitioner's person or in his vehicle, both of which were properly searched based on Petitioner's consent, concerns for officer safety, and as a search incident to arrest (R. 17, Ex. A — Defendants' Motion for Summ. J, Officer Jackson Dep., at Ex. 1 – DVD, 22:07:03, upper right video; R. 19 – Affidavit of Papierz, ¶¶ 13-14 and Ex. 1 – DVD; *see also* Sixth Circuit Opinion, Petitioner's Appendix A-3 ("Papierz thereafter consented to be searched by the Officers").

intrusion of [Petitioner's] person, home, papers, or effects" (*Id.* at A-12, *citing* U.S. Const. amend IV). The Sixth Circuit also held that its case law "has established that a person does not have a reasonable expectation of privacy while on a friend's property, in which the person is merely a short-term visitor" (*Id.*, *citing United States v. Berryhill*, 352 F.3d 315, 317 (6th Cir. 2003), and also held that "a person [ ] lacks a reasonable expectation of privacy in items laying in the public's view (*Id.*, *citing United States v. McClendon*, 84 F. App'x. 92, 94-95 (6th Cir. 2004).[4]

The District Court correctly dismissed this case in its entirety and the Sixth Circuit appropriately affirmed the dismissal based on clearly established legal principles of this Honorable Court as well as the Sixth Circuit. Accordingly, not only has there been no error committed in the application of settled law (which would ordinarily not result in a Petition being granted, *see* Sup. Ct. R. 10), but in addition the Sixth Circuit ruling does not conflict with decisions of its sister circuits, has not decided the federal questions involved in this case in a manner "that conflicts with a decision by a state court of last resort" and, given the fact that the Sixth Circuit and Western District of Michigan decisions correctly applied settled law, the decision of the Sixth Circuit cannot be construed as having "so far

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[4] The District Court also granted summary judgment on the alternative ground of qualified immunity (R. 26 – Transcript of Motion for Summ. J., pp. 33-34; Appendix A, pp. 32a-33a). "Because [Petitioner's] Section 1983 claim fails under the Fourth Amendment," the Sixth Circuit found "it unnecessary to reach the issue of qualified immunity" (Petition, Appendix A, A-14).

departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Honorable Court's supervisory power."[5] Sup. Ct. R. 10(a)-(c).

Accordingly, Petitioner has failed to provide this Honorable Court with "compelling reasons" as to why the Petition should be granted. Sup. Ct. R. 10.

2. Statement of Facts.

A. The Sixth Circuit's Factual Uncontested Factual Findings.

Petitioner has not challenged any of the undisputed factual circumstances surrounding this case, all of which were succinctly set forth in the Sixth Circuit Opinion, which has been attached as Appendix A to the Petition, and reiterated here for ease of reference.

> On February 16, 2006, at around 10:00 p.m., Papierz was on his way to a bowling alley when he decided to stop at a friend's apartment to see if he wanted to accompany him. (Joint Appendix ("J.A.") at 131.) On his way there, Papierz stopped at a convenience store and purchased a Gatorade as well as a packet of herbal male enhancement pills. (*Id.*) After

[5] Indeed, Petitioner concedes that he is "unable to cite to this court any specific decision of this Court, or any other court for that matter, that specifically so interprets the Fourth Amendment as this case appears to be one of first impression" (Petition, p. 15).

leaving the convenience store, Papierz drove to his friend's apartment. Both Officer Jackson and Sgt. Ergang were working separately on routine road patrol in Kalamazoo, Michigan that evening, when, according to the Officers, they observed Papierz's pick-up truck traveling with only its parking lights on and not the headlights. (J.A. at 48, 86.) The Officers signaled to him to stop. (*Id.*) Papierz pulled into his friend's driveway, and the Officers pulled in behind him. (J.A. at 49, 87, 132.) When Papierz got out of his vehicle, the Officers approached him and requested that he produce a driver's license. (J.A. at 51, 88, 133.) The Officers then contacted dispatch, who ran Papierz's name and date of birth through the Law Enforcement Information Network ("LEIN"). (J.A. at 51, 88.) The dispatcher informed the Officers that according to LEIN, Papierz had a suspended and expired license. (*Id.*)

Papierz thereafter consented to be searched by the Officers. According to the Investigation Report completed by the Officers, they found several pills in his left front pocket, which included the male enhancement pills, as well as what the Officers describe as an unknown pill in a clear plastic capsule. (J.A. at 108.) After completing this search, the Officers handcuffed Papierz and placed him in the back of a patrol car. (J.A. at 134.) They then searched his car but found nothing suspicious. They maintain, however, that they found

several pills on the ground near Papierz's vehicle, which were identical to the unknown pill found in his pocket. (J.A. at 108.) Officer Jackson then drove to the local hospital, where a doctor allegedly identified the pills as Vicodin. (J.A. at 54.)

When Officer Jackson returned with this information, Sgt. Ergang read Papierz his *Miranda*[6] rights, which he waived. (J.A. at 134-35.) Sgt. Ergang then began questioning him about the Vicodin allegedly found near his car. (J.A. at 90.) Papierz replied that the pills found on the ground were not his, but that he had a prescription for Vicodin due to a recent heart surgery. (J.A. at 135.) Papierz later admitted that he had a bottle of Vicodin in the truck during this incident, but maintained that the pills that the Officers allegedly found on the ground were not his. (J.A. at 133.)

While Sgt. Ergang continued to question Papierz, Officer Jackson approached Cameron Alger and his wife, Hollie, who lived nearby and were watching and videotaping the interaction between the Officers and Papierz. (J.A. at 57, 90.) Officer Jackson asked them if they observed Papierz throw narcotics on the ground. (J.A. at 57.) Officer Jackson admits that they responded that they saw the Officers plant the drugs on the ground, and the

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[6] *Miranda v. Arizona*, 384 U.S. 436; 86 S.Ct. 1602; 16 L. Ed. 2d 694 (1966).

neighbors indicated to the Officers that they videotaped these actions. (J.A. at 57.) Sgt. Ergang also admits that he then lied to Papierz by telling him that the neighbors said that they saw him throw the pills on the ground and that they would testify against him to this effect. (J.A. at 90-91.) Consistent with the neighbors' account, Papierz maintained that the Vicodin on the ground did not belong to him. (J.A. at 227-28.)

After a forty-five minute investigation, the Officers issued Papierz a civil infraction for driving without his headlights on after dark. (J.A. at 155.) Upon releasing Papierz, the Officers advised him that they would continue to investigate the Vicodin issue as well as whether he was driving without a valid license. (J.A. at 93-94.) After the Officers consulted the township prosecutor about Papierz, they decided not to further investigate his alleged illegal possession of the Vicodin. (J.A. at 157.) They did, however, issue a modified citation to Papierz that added the misdemeanor offense of driving with a suspended license. (J.A. at 160.) Papierz was not charged in connection with the Vicodin.

On February 2, 2007, Papierz filed the instant action in the United States District Court for the Western District of Michigan, asserting a claim for false arrest under state law as well as a claim under 42 U.S.C. §§ 1983 and 1985 for violations of his rights under the Fourth

Amendment. (J.A. at 11.) In his Complaint, Papierz alleges that the Officers planted false evidence against him in an attempt to frame him for a crime he did not commit. (J.A. at 9 .) He further alleges that he was arrested by the Officers without probable cause. (J.A. at 10.)

Thereafter, the Officers filed a Motion to Dismiss Pursuant to Federal Rule of Civil Procedure 12(b)(6) or Alternatively, Motion for Summary Judgment Pursuant to Federal Rule of Civil Procedure 56(c). (J.A. at 16.) The Officers sought dismissal of Papierz's Fourth Amendment claim on the grounds that the stop and frisk was reasonable pursuant to a valid stop and that the subsequent search of the car was valid because it was incident to his arrest. (J.A. at 31.) In addition, they noted that Papierz gave his consent to the search of his person. (*Id.*) They further argued that even if they conducted an unreasonable search of Papierz, they were entitled to qualified immunity. (J.A. at 39.) Lastly, they sought dismissal of Papierz's state law claim for false arrest, as the Officers had probable cause to arrest him based on the two misdemeanor traffic offenses that were discovered during the traffic stop. (J.A. at 41.) In his response to the Motion, Papierz withdrew his false arrest claim under state law, conceding that the facts did not support this claim. (J.A. at 219.)

The district court then held a motion hearing regarding the remaining issues. (J.A. at 229.) At this hearing, Papierz's counsel emphasized that he was not contesting the legality of the stop, arrest, and search of his car. (J.A. at 242.) He also noted that "[t]his is a search case. It's not a seizure case." (*Id.*) Counsel clarified that Papierz was alleging that an unreasonable search occurred when the Officers planted the Vicodin on the ground outside of Papierz's car. (J.A. at 245.)

After hearing the arguments of the parties, the district court first stated on the record that the Officers' *Terry*[7] stop was proper as well as the Officers' arrest of Papierz and subsequent search of his car. The court found that the Officers clearly had probable cause based on their reasonable belief that he committed two arrestable misdemeanors under Michigan law, driving without a valid license and driving at night without headlights. The court noted, however, that it did not need to make such a ruling as Papierz was not contesting the traffic stop, arrest, or search of his car incident to his arrest. (J.A. at 255-56.)[8]

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[7] *Terry v. Ohio*, 392 U.S. 1; 88 S. Ct. 1868; 20 L. Ed. 2d 889 (1968).

[8] Petitioner has conceded this in the Petition as well: "It is undisputed that it was lawful to approach Petitioner for driving at night with his parking lights, instead of his headlights. The dispatcher did advise that Petitioner's license was suspended. . . . It justified the arrest" (Petition, p. 15).

The court then held that framing a citizen with planted evidence when the charge does not actually "come to fruition" is not a constitutional violation under either the Fourth or Fourteenth Amendment. (J.A. at 258.) The court further found that had the framing actually "come to fruition," the Fourth Amendment still would not be implicated as there is no right under this Amendment for a citizen to be free from an attempt on the part of police officers to frame him. (*Id.*) Instead, it would be a violation of his due process rights under the Fourteenth Amendment. (J.A. at 258.)

Lastly, the court held, in the alternative, that qualified immunity protected the Officers from liability. (J.A. at 261.) Specifically, he found that, even if the Officers' actions did constitute a violation under the Fourth Amendment, this right was not clearly established. (J.A. at 262.) The court emphasized that police have great discretion in "their ability to use ruses, to use and lie to citizens . . . [to] try to escalate what they think they have on a person." (J.A. at 259). Based on this analysis, the court granted summary judgment in favor of the Officers. (J.A. at 14.) Papierz timely appealed the district court's Order, arguing that the trial court erred in its ruling with regard to the Fourth Amendment and qualified immunity.

(Petitioner's Appendix A, A-2 – A-9).

B. The Sixth Circuit's Ruling Affirming Summary Judgment.

Based on these facts, the Sixth Circuit affirmed the District's Court ruling:

> The facts at issue here are distinguishable from a typical case involving a police officer accused of planting false evidence. Generally, police officers are accused of planting evidence on a victim as a basis to arrest the victim and/or to charge him with an offense connected to the planted evidence. The victims then typically challenge the constitutionality of the arrest or the charges brought in connection with the planted evidence.
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> Here, however, Papierz was not charged in connection with the allegedly planted Vicodin and does not challenge his arrest. He also concedes that the Officers had a basis to conduct a search of his car and his person.[9] Papierz, instead, contends that the Officers conducted an unreasonable search under the Fourth Amendment by planting false evidence. The court, therefore, is presented with the limited issue of whether the Officers'

[9] This has been conceded before this Court as well: "Respondents had a lawful right to search Petitioner's person and effects incident to the arrest" (Petition, p. 15).

purported conduct of planting Vicodin on the ground, in a public place near Papierz's car without charging him or arresting him for any crime related to the drugs, gives rise to an unreasonable search in violation of the Fourth Amendment. We find that these particular circumstances do not.

The Fourth Amendment reads as follows:

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

* * *

In the instant case, Papierz's claim fails initially upon analysis of the language of the Fourth Amendment itself, as the Officers' conduct of planting drugs on the ground in a public place did not involve any intrusion of Papierz's person, home, papers, or effects. *See* U.S. Const. amend IV. This conclusion that no Fourth Amendment violation occurred is further supported by case law construing the bounds of the Fourth Amendment. The Sixth Circuit has established that a person does not have a reasonable expectation of privacy while on a friend's property, in which the person is

> merely a short-term visitor. *See United States v. Berryhill*, 352 F.3d 315, 317 (6th Cir. 2003) ("[A] casual, transient visitor does not have a reasonable expectation of privacy in his host's home."). Papierz was merely stopping by a friend's apartment to see if the friend wanted to accompany him to the bowling alley and had no reasonable expectation of privacy in the driveway of his friend's apartment. Furthermore, this Circuit has held that a person also lacks a reasonable expectation of privacy in items laying in the public's view. *See United States v. McClendon*, 86 F. App'x 92, 94-95 (6th Cir. 2004) (discussing *United States v. Oswald*, 783 F.2d 663 (6th Cir. 1986) and *United States v. Rumph*, No. 97-3135, 1998 U.S.App. LEXIS 9584 (6th Cir. May 8, 1998)). The drugs, in this case, were purportedly placed openly on the ground, available for public view. Thus, the Officers' purported conduct did not invade Papierz's reasonable expectation of privacy.
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> * * *
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> Accordingly, the district court did not err in concluding that no Fourth Amendment violation for an unreasonable search occurred.

(*Id.* at A-9 – A-14).

SUMMARY OF THE ARGUMENT

The allegation made by Petitioner in this case is that the Officers planted Vicodin, not in his home, not on his person, not in his vehicle, but rather in the public front yard of property not fenced, not owned by him, and in an area no one, including the homeowner, would have had a reasonable expectation of privacy. Even assuming that this is true, Petitioner was never arrested or charged with any drug-related offense as a result of the Officer's alleged actions.

As the District Court and United States Court of Appeals have held, there simply can be no Fourth Amendment violation based on the facts as alleged by Petitioner.

Alternatively, should this Honorable Court disagree and find that the alleged planting of evidence in a public place where an individual has no reasonable expectation of privacy violates the Fourth Amendment, Plaintiff has admitted, "this case appears to be one of first impression" (Petition, p. 15). Thus, the Officers are entitled to qualified immunity with regard to the allegations in this case.

Accordingly, Respondents respectfully state that the Petition should be denied.

REASONS FOR DENYING THE PETITION

A. PETITIONER HAS FAILED TO ESTABLISH ANY ERROR IN THE SIXTH CIRCUIT'S AND DISTRICT COURT'S RULING THAT THE ALLEGED PLANTING OF EVIDENCE IN A PUBLIC PLACE WITHOUT ANY SUBSEQUENT ARREST, CHARGES OR CONVICTIONS OF THE INDIVIDUAL, DOES NOT IMPLICATE THE FOURTH AMENDMENT.

Petitioner has framed the argument in the following manner: "A police officer who plants evidence for the purpose of framing a person violates the Fourth Amendment" (Petition, p. 12; *see also* Petition, Question Presented, i). However, that precise question is not before this Court. Rather, this Court must decide whether the act of a police officer planting evidence on the ground, in a public place, and then proceeding to search that area and accuse an individual in that area of a crime on the basis of the planted evidence, without arresting or seeking charges based on the planted evidence, constitutes an unreasonable search under the Fourth Amendment? The answer to this question, as held by the District Court and Sixth Circuit, respectfully, is no.[10]

Petitioner asserts that the "Sixth Circuit went to misguided lengths to reject" his theory "that the

[10] Petitioner has only claimed an alleged Fourth Amendment violation. Petitioner has not asserted any other alleged constitutional violation as a result of Respondents' alleged actions in this case.

planting of evidence for the purpose of framing an individual makes what would otherwise be a reasonable search without a warrant into an 'unreasonable search' that violates the Fourth Amendment" (Petition, p. 15). Respondents respectfully disagree, as both the plain language of the Fourth Amendment as well as 200 years of legal precedent disputes Petitioner's claim.

As noted above, the Fourth Amendment states:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. Const. amend IV (emphasis added). Here, Petitioner has alleged that planting evidence on the ground and then accusing, but not arresting, someone of committing a drug crime implicates the Fourth Amendment.

Respectfully, that behavior, while reprehensible if true, does not amount to a search of a person, the person's house, or the person's papers and effects. Indeed, as the Sixth Circuit succinctly stated in this case: Petitioner's "claim fails initially upon analysis of the language of the Fourth Amendment itself, as the Officers' conduct of planting drugs on the ground in a

public place did not involve any intrusion of Papierz's person, home, papers, or effects"[11] (Petitioner's Appendix A, A-12).

In addition to the plain language of the Fourth Amendment, case law, of this Court as well as the Sixth Circuit, confirms that Petitioner's allegation simply does not implicate the Fourth Amendment.

> The occurrence of a "search" is defined in terms of whether a person had a "constitutionally protected reasonable expectation of privacy." *Katz v. United States*, 389 U.S. 347, 360; 88 S. Ct. 507; 19 L. Ed. 2d 576 (1967) (Harlan, J., *concurring*). When interpreting the *Katz* definition, a "reasonable expectation of privacy" exists when (1)
>
> "the individual [has] manifested a subjective expectation of privacy in the object of the challenged search" and (2) "society [is] willing to recognize that expectation as reasonable." *California v. Ciraolo*, 476 U.S. 207, 211; 106 S. Ct. 1809; 90 L. Ed.2d 210 (1986).

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[11] Petitioner notes that the dictionary definition of "effects" is "belongings, property: as, household effects." Based on this definition of "effects," how can Petitioner claim that the search of public property constitutes a belonging, property, or household effect" of which he is entitled to privacy?

> "The second prong of the *Katz* definition generally addresses two considerations: The first [consideration] focuses on "what a person had an expectation of privacy *in*, for example, a home, office, phone booth or airplane."

Taylor v. Mich. Dep't. of Natural Resources, 502 F.3d 452, 455-456 (6th Cir. 2007), *quoting in part Widgren v. Maple Grove Township*, 429 F.3d 575, 578-579 (6th Cir. 2005) (emphasis in original) (internal citations omitted).[12]

Petitioner's claim fails under both prongs.

With regard to the first prong, Petitioner has repeatedly claimed that the Vicodin allegedly planted on the ground was not his (R. 17, Papierz Affidavit, ¶ 16 ("Defendants accused me of throwing these new pills on the ground. I had not thrown any pills on the ground"). Due to these repeated denials of ownership, Petitioner has not "manifested a subjective expectation of privacy in the object of the challenged search." *Taylor*, *supra*, *quoting Ciraolo*, *supra* at 211.

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[12] Stated another way, for a person to have standing to assert a Fourth Amendment violation, the person must have "a reasonable expectation of privacy in the property searched or the items seized." *United States v. Melendez*, 2004 U.S. Dist. LEXIS 620, * 15, *citing Minnesota v. Olson*, 495 U.S. 91, 96; 109 L. Ed. 2d 85; 110 S. Ct. 1684 (1990) (*citing Rakas v. Illinois*, 439 U.S. 128, 143; 58 L. Ed. 2d 387; 99 S. Ct. 421 (1978)) (emphasis added). Here, as discussed *infra*, Plaintiff simply did not have a reasonable expectation in either Vicodin pills he claims were not his or in the area in which the Vicodin pills were allegedly planted.

In addition, assuming the first prong was met by Petitioner in the instant case, with regard to the second prong, the Court must ask whether "society [is] willing to recognize" Plaintiff's subjective expectation of privacy in Vicodin pills (he claims are not his) located on the ground in an area open to the public and not owned by Plaintiff?

Respondents respectfully suggest that the case law answers this question in the negative, as it cannot be said that society is willing to provide Petitioner with a reasonable expectation of privacy with regard to illegal items located in plain view in the front yard of an apartment complex, in an area readily accessible to the public, especially when Plaintiff did not live in the apartment complex. *See McClendon, supra* at 94-95, *citing Rumph, supra* (person did not have reasonable expectation of privacy "in items lying in his driveway and visible from the street"); *United States v. Oliver*, 657 F.2d 85, 87 (6th Cir. 1981) (internal citations omitted) ("case law has established that a subjective expectation of privacy is reasonable if it: (1) is a privacy expectation normally shared by people in that setting, and (2) it falls within some tolerance level which represents limits of what society can accept given its interest in law enforcement"); *United States v. Stuckey*, 253 Fed. Appx. 468, 479 (6th Cir. 2007), *citing Katz, supra* ("an individual may only claim the protection of the Fourth Amendment if he has a legitimate expectation of privacy in the premises being searched").

In addition to this case law, all of which was appropriately relied on by the Sixth Circuit in this case, Respondents note the well-reasoned opinion of the

District Court in further support for the proposition that Petitioner's allegations simply does not implicate the Fourth Amendment:

> And so that leaves this theory that citizens have a Fourth Amendment right to be free, if you will, from an attempted police plant of evidence in the course of an attempt to frame a citizen. And I think as reprehensible as that conduct would be if it occurred, either in this case or any other, it's not a Fourth Amendment violation, at a minimum, when it doesn't come to fruition. And it didn't here.
>
> And the reality is that even if it did come to fruition [i.e., P]laintiff was arrested because of the planting of evidence], I don't believe it's a Fourth Amendment issue at all. I think the law would say if in fact somebody was charged and prosecuted based on falsely planted evidence in the course of an attempt to frame an innocent person, there may very well be a due process violation but not a Fourth Amendment violation.
>
> And some examples of cases describing that would be [*United States v. Epley*, 52 F.3d. 571 (6th Cir. 1995) and *Frantz v. Bradford*, 245 F.3d 869 (2001)], both of which are cited in an unpublished Eastern District of Michigan case, [*United States v. Melendez*, Case No. 03-80598, 2004 U.S. Dist. LEXIS 620 (E.D. Mich. 2004)].

> So fundamentally there's not a Fourth Amendment right of a citizen to be free from an attempt on the part of police officers to frame him. So even assuming the factual scenario that the plaintiff paints, I don't think there's a Fourth Amendment claim stated, and defendants would still be entitled to summary judgment.

(R. 26, pp. 29-30; Appendix A, p. 29a).

Accordingly, Petitioner simply has failed to establish any error on the part of either the District Court or the Sixth Circuit with regard to their rulings, based on the plain language of the Fourth Amendment as well as this Court's interpretation of the Fourth Amendment, that the Fourth Amendment is not implicated by Respondents' alleged actions in this case.

B. BECAUSE THIS IS AN ISSUE OF FIRST IMPRESSION, THE OFFICERS ARE ENTITLED TO QUALIFIED IMMUNITY.

Respondents also note that while Petitioner has challenged the Fourth Amendment ruling of the Sixth Circuit, he has not challenged the District Court's ruling that Respondents are entitled summary judgment based on the qualified immunity defense. Because this issue has gone unchallenged by Petitioner, Respondents are clearly entitled to qualified immunity in this case regardless of whether this Court finds Petitioner's question worthy of certiorari.

> "Under the doctrine of qualified immunity, 'government officials performing discretionary functions generally are shielded from liability from civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.'" *Phillips v. Roane County*, 534 F.3d 531, 538 (6th Cir. 2008) (*quoting Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S. Ct. 2727, 73 L. Ed. 2d 396 (1982)). Determining whether the government officials in this case are entitled to qualified immunity generally requires two inquiries: "First, viewing the facts in the light most favorable to the plaintiff, has the plaintiff shown that a constitutional violation has occurred? Second, was the right clearly established at the time of the violation?" *Id.* at 538-39 (*citing Silberstein v. City of Dayton*, 440 F.3d 306, 311 (6th Cir. 2006).

Dominguez v. Corr. Med. Servs., 555 F.3d 543, 549-550 (6th Cir. 2009);[13] *see also Saucier v. Katz*, 533 U.S. 194; 150 L. Ed. 2d 272; 121 S. Ct. 2151 (2001).

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[13] *Dominquez* also noted that while this two-part test is the standard test to apply when determining whether qualified immunity applies, this Honorable Court recently held in *Pearson v. Callahan*, __ U.S. __; 128 S. Ct. 808; 172 L. Ed. 2d 565 (2009) that the "the two-part test is no longer considered mandatory; thereby freeing district courts from rigidly, and potentially wastefully, applying the two-part test in cases that could more efficiently be resolved by a modified application of that framework." *Dominquez*, *supra* at 550, *citing*, *Pearson*, *supra*.

When considering the second prong, this Court has held that

> [q]ualified immunity shields an offer from suit when [the officer] makes a decision that, even if constitutionally deficient, reasonably misapprehends the law governing the circumstances [the officer] confronted. . . . Because the focus is on whether the officer had fair notice that [the] conduct was unlawful, reasonableness is judged against the backdrop of the law at the time of the conduct. If the law at that time did not clearly establish that the officer's conduct would violate the Constitution, the officer should not be subject to liability or, indeed, even the burdens of litigation.

Brosseau v. Haugen, 543 U.S. 194, 198, 125 S. Ct. 596, 160 L. Ed. 2d 583 (2004).

Based on this precedent, the District Court properly ruled as follows:

> I will rule alternatively on qualified immunity. Obviously the first prong is that there be a constitutional violation, and based on what I've already said, I don't think there is.
>
> The second prong, though, is that the right violated be clearly established. And from what I've already said, even if there is or if some court subsequently revisits this whole line of jurisprudence and says, [y]ou know what, we

> don't like it either, we're going to create a new constitutional right that says part of an unreasonable search is one that's conducted or that was meant to be used or trumped up, if you will, to support a false prosecution – let's assume that happens – it's certainly not clearly established today under present law. I would say quite the contrary. The police have wide latitude to suggest to a person who is already lawfully under arrest that they have evidence, that they may not – that they may in fact not have, but to use that in the course of attempting to probe the citizen to find out what the citizen is going to say or admit to.
>
> So I think for those reasons summary judgment on this case is appropriate for the defendants, and I'll enter an Order that says that.

(R. 26, pp. 33-34; Appendix A, pp. 32a-33a).[14]

Based on the legal precedent, it simply cannot be said that an objectively reasonable police officer in Respondents' position, would have concluded that planting Vicodin on the ground, in an area readily open to the public and that was not owned or controlled by Plaintiff, was clearly established to be a violation of

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[14] The Sixth Circuit left the District Court's ruling in this regard unchallenged, stating that "it was unnecessary to reach the issue of qualified immunity" since Petitioner's "claim fails under the Fourth Amendment" (Petitioner's Appendix A, A-14).

Plaintiff's Fourth Amendment rights. Simply put, a reasonable police officer would not have concluded that such actions constituted a search in violation of the Fourth Amendment. Accordingly, the District Court properly held that at the time of the alleged Fourth Amendment violation (e.g., the planting of drugs in a public place) in this case, case law did not clearly establish that a police officer would be violating the Fourth Amendment by planting evidence on the ground in an effort to frame that individual.

Consequently, should this Court disagree with the District Court and Sixth Circuit's interpretation of settled precedent in this case, or, as Plaintiff contends, finds that this is a case of first impression warranting this Court's review (Petition, p. 15), it is clear that Respondents are entitled to qualified immunity. *Brosseau, supra.*

CONCLUSION

Petitioner has failed to establish any error on the part of the lower courts in this case. In addition, Petitioner has failed to establish that the allegations in this case, e.g. planting Vicodin in a public place not owned by him and subsequently accusing him (but not arresting him) of illegal drug possession based on Respondents' "search" of the publicly accessible front yard of an apartment complex, implicates the Fourth Amendment prohibition against unreasonable search and seizures. As a result, Petitioner has failed to establish any other "compelling reason" as to why this Honorable Court should exercise its discretion and grant certiorari in this case.

Accordingly, Respondents respectfully request that this Honorable Court deny the Petition since none of Petitioner's arguments constitute reasons for granting certiorari pursuant to Sup. Ct. R. 10.[15]

Respectfully submitted,

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[15] Moreover, Respondents note that even if this Court decides to exercise its discretion to answer the question of whether the Fourth Amendment was implicated by their alleged actions in this case, they are entitled to qualified immunity given the fact that based on previous Fourth Amendment precedent of this Court and the Sixth Circuit, they were not on clear notice of a Fourth Amendment violation.

APPENDIX

APPENDIX — TRANSCRIPT OF PROCEEDINGS IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MICHIGAN, SOUTHERN DIVISION DATED MARCH 27, 2008

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

DOCKET NO. 1:07-cv-0115

GREGORY J. PAPIERZ,

Plaintiff,

vs.

SCOTT JACKSON and BRYAN ERGANG,

Defendants.

TRANSCRIPT OF MOTION FOR SUMMARY JUDGMENT

BEFORE THE HONORABLE ROBERT J. JONKER

UNITED STATES DISTRICT JUDGE

GRAND RAPIDS, MICHIGAN

March 27, 2008

* * *

[2] Grand Rapids, Michigan
March 27, 2008
10:32 a.m.

PROCEEDINGS

THE COURT: This is the summary judgment hearing date and time for it in the Papierz against Jackson, et al., 1:07-cv-115.

Can we start with appearances, please.

MR. FIELD: Samuel Field for the plaintiff, Your Honor. And by the way, it's Papierz.

THE COURT: All right. Thank you.

MR. FIELD: The only way I could get to pronounce the man's name correctly was not to look at it.

THE COURT: Thank you. Papierz. All right.

[3] *MR. MORRIS:* Your Honor, my name is Gus Morris. I represent the defendants Officers Jackson and Ergang.

THE COURT: All right. Thanks.

Well, we've gone through the materials, I've looked at the CD, so I'm ready to hear your arguments. I may have some questions. I think it's pretty straightforward

from your briefing but I want you to present whatever arguments you've got today.

The questions that I have are likely to come up in the course of the discussion, and then we can take it from there.

MR. MORRIS: Your Honor, I think it's important when we analyze the legal issues presented by this case and this motion to keep in mind what it is that we're dealing with.

First of all, we know now from plaintiff's brief there is no state claim of false arrest, so that's out. What's left is count II of plaintiff's Complaint, which is a Fourth Amendment unreasonable seizure claim.

It's important, I think, also to remember that the Fourth Amendment does not prohibit unreasonable police behavior; it prevents unreasonable seizures by police.

This determination of whether or not something is unreasonable, seizure that is, is an objective one, and the alleged ill will or subjective intent of a police officer doing the seizing is irrelevant in this determination.

[4] With that in mind, I'll make several arguments with regard to the Fourth Amendment claim. I would like to, if it pleases the Court, to discuss the individual capacity argument which comes first in my brief.

THE COURT: Why does it really matter to you? I mean he says, I'm not suing — I'm not suing the county; he names the individuals. You have a theory that you win as individuals, but what does that get you one way or the other?

MR. MORRIS: You've anticipated what I was going to say, Judge.

THE COURT: Okay.

MR. MORRIS: I put it first in my brief, but I think you're right, for the legal issue presented it's somewhat irrelevant. I do want to say to the Court I do raise it because I think I'm obligated to do so on behalf of my clients. But I recognize the Sixth Circuit does generally say now course of proceedings test, I think, is the latest case.

Certainly I pled an affirmative defense of qualified immunity, I argued this brief as if they were in their individual capacity. I just wanted to explain to the Court why I raised that issue.

THE COURT: All right.

MR. MORRIS: Moving to the more substantive issue in the case, I think another important notion that we must take into account from the Sixth Circuit case law is that when you [5] have a Fourth Amendment claim, you're supposed to analyze the claim in the segments so you look at what police activity implicates the Fourth

Amendment and then make a determination based on that. So, for example, I do represent a lot of police officers, and we have cases where there may be a stop, there may be an arrest, there may be use of force. And the point I'm trying to make, Your Honor, is you have to analyze each segment that implicates the Fourth Amendment.

With that in mind, in my judgment the first event that implicates the Fourth Amendment in this case is the traffic stop. Clearly, case law says when a police officer effects a traffic stop, that is a seizure to some extent under the Fourth Amendment that has to be analyzed. It also is clear, I think, that when a police officer witnesses a civil infraction taking place, the Fourth Amendment does enable him to effect that stop or seizure. So the issue when you are presented with a motion for summary judgment: Is there a genuine issue of material fact as to the facts that are in the case that support the stop? And I think in this case we have to look at a couple things.

First of all, the plaintiff's Complaint I don't believe alleges that the stop itself violated the Fourth Amendment, so there's an issue whether or not that's even before the Court. But assuming you would read the Complaint broadly, because it does say Fourth Amendment, I [6] think that the undisputed facts in this case indicate that in fact Mr. Papierz was proceeding down the road with only his overhead lights on, the lights on top of the cab of the pickup and his fog lights.

If you analyzed the DVD of the police officer's video camera, I think it comes by quickly, but you can see that he was driving without his headlights on. And further, plaintiff's refutation of the claim that the officers observed him driving without his headlights on is simply in this brief and in his affidavit, "I thought that they were on." Nowhere in any of the materials does the plaintiff affirmatively assert that they were on and the police officers are lying. So I think that even viewing the facts in a light most favorable to the plaintiff, there is no evidence to support the claim that they were on, which would make the traffic stop unreasonable. So I think the stop itself gets us by the Fourth Amendment scrutiny.

The next issue that I wanted to briefly address, and again I'm not certain it's still before the Court, is the search. There are two searches that the police officers did, one of the plaintiff's person, the other of the vehicle. I don't think either of these are mentioned in the plaintiff's response to my motion, and so I will just briefly mention them in my argument,

I think the search of the plaintiff is clearly [7] justified. There's a consent argument there. I think there are facts to support consent. Plaintiff doesn't dispute that. But even if it weren't there, for officer safety, the search of plaintiff's person is clearly allowable. Or in the event that there was an arrest, incident to arrest.

Secondly, the search of the vehicle, I think, is clearly authorized by Michigan versus Long in the cases that I cited there. And, again, plaintiff hasn't addressed this issue, so I think that probably it's no longer part of the case.

So the real meat of the issue is what about the seizure itself of plaintiff's person? There is no dispute that he was detained, not free to leave for a period of approximately 40 to 45 minutes after this stop.

Now, of course, the plaintiff has alleged that there was some inappropriate and possibly illegal behavior by the police officers involved in this incident. He claims that they planted Vicodin on the ground and tried to frame plaintiff for this offense.

What I submitted to you in my brief and will reiterate here today is that those factual allegations are irrelevant to the determination before Your Honor. And the reason I say that is because it is an objective determination based upon the undisputed facts whether this 40- to 45-minute seizure that clearly implicates the Fourth Amendment was [8] supported by probable cause. It doesn't matter that the police officers had ill will or some bad motive and that caused them to detain him.

I have been faced with a number of cases where it's alleged that there was ill will and motive, and that's simply not the issue, because of the standard in the Fourth Amendment that's objective and unreasonable seizure.

We have alleged that this detention of 40 to 45 minutes was only that. It was a detention and not a formal arrest. I've argued this issue, and, frankly, I think it's probably debatable in this case. I think slightly it probably falls on the detention side as opposed to the arrest side, but I think that you could make an argument that in fact it was an arrest. Clearly he's not free to leave. He's in the back of a police car.

THE COURT: Was he cuffed or not?

MR. MORRIS: I do not believe he was cuffed, Your Honor.

THE COURT: I couldn't find that in the record. It might be in the record. One of the officers said, "You're under arrest," right?

MR. MORRIS: Yes, that's correct.

THE COURT: Gave him Miranda rights?

MR. MORRIS: That's essentially correct.

THE COURT: The back of the car is only opened from [9] the outside.

MR. MORRIS: Right. And again, importantly I think those things, those determinations by the officers, those statements, they are not determinative to what Your Honor has to decide in this case. Obviously a police officer's subjective determination that he's placing

someone under arrest does not bind Your Honor to determine whether or not it in fact was an arrest.

THE COURT: Right, But I mean if he goes beyond subjective determination to tell the citizen, "You're under arrest, you have the right to remain silent," a reasonable citizen might think, "Well, I'm not free to leave. I'm under arrest."

MR. MORRIS: Correct, I agree with you. I agree with you.

All right. Moving on, though, to the more important issue, let's assume for the sake of our discussions that this was an arrest, and then the question becomes: Is it supported by probable cause? And in this case, to us arguing the defense, it is clear that there really is no factual dispute as to whether or not probable cause supported this arrest.

The plaintiff has admitted in his deposition that his driver's license was expired. It is clear from reviewing the Michigan statutes that driving with an expired license is a misdemeanor, it is an arrestable offense, and that admission in [10] and of itself, I think, wins the case for the police officers.

In addition to that, we have supported the plaintiff's admission that his license was suspended and/or, I'm sorry, expired with evidence from the Secretary of State that in fact it was expired. He did not have a valid license on the date of this incident, and there's no dispute that

he was driving. And I think it's important because the plaintiff has alleged the ill will or motive to determine that — to recognize that case law tells us that even if an officer arrests somebody believing he had probable cause to support an offense that in his mind he was arresting the individual for, but its later determined that he, in fact, did not, but had probable cause for a different offense that the officer himself was totally unaware of at the time that the arrest occurred, Sixth Circuit case law, I think, clearly tells us that it's still a valid arrest because objectively a reasonable police officer could have concluded that probable cause existed even for a different offense than our particular police officer had in mind when he did make the arrest. And so because of the plaintiff's admission that he's expired, the arrest is supported by probable cause.

One other issue I want to bring before the Court that I've raised in my brief, because I think it's important, but I'm not sure it's necessarily determinative, is the qualified immunity issue. It was not directly addressed in plaintiff's [11] brief. Arguably it was indirectly addressed. But qualified immunity is a doctrine under Section 1983 law that says an individual who is sued under Section 1983 cannot be held liable for money damages so long as his actions were objectively reasonable.

In the most recent Supreme Court case — one of the most recent ones addressing the qualified immunity issue, Saucier versus Katz, which I have addressed in my brief, tells us that the determination of whether qualified immunity applies is a two-prong test.

The first prong is, one, whether or not a constitutional deprivation occurred. All of these discussions I've been bringing before Your Honor alleging that there was probable cause and no constitutional deprivation are applicable to the first prong of the qualified immunity test.

The second prong of the test is that if an objectively reasonable police officer could have concluded probable cause existed, even if later it's determined by the Court that that was a mistaken conclusion by the police officer, as long as his mistake was a reasonable one, he has no liability for money damages under Section 1983.

I don't think it's necessary to get to that second prong because I think I've shown that there is no constitutional deprivation, but even if Your Honor were wavering somewhat on that issue, I think the qualified immunity [12] issue still carries the day just by the fact that you would waiver on that issue. Because if it's a call that could be made either way, so to speak, then clearly the officer's mistake about whether or not probable cause existed was a reasonable one, and, therefore, he would not have any liability under Section 1983 for money damages. Thank you.

THE COURT: Okay. Just sort of a general question, and I didn't see allusions in the record, it's not in the briefing, and it's frankly, I suppose, not directly relevant or bearing on it, but I'm curious, I watched the video, and you don't have benefit — at least I didn't hear dispatch and things on it, so I'm not sure what's going

on — but I see not a lot of traffic, traffic going back and forth. I see a headlight. And I do, I see it looks like the headlights are off, the truck goes by. And then it was a pretty fast move following the guy followed by another car. And my immediate reaction is, "Jeez, two cops chasing a car without headlights. What's going on?" So what's going on? And you watch the first, I don't know, 8 or 10 minutes of it and they are just kind of cruising through an apartment complex. I mean, are they looking for something out there? What's going on?

MR. MORRIS: Well, their testimony was, no, they were both working road patrol that night, they were not members of any drug enforcement team or anything of that nature. They were working road patrol in a particular area of the township [13] where there are more than one car — is more than one car assigned. And they just happened to be in the area coincidentally at the time. I know plaintiff has drawn a conclusion that that was not the case, but that was the testimony of the officers.

THE COURT: All right.

MR. MORRIS: And I would say to Your Honor, like I think you alluded to, I don't think it would matter. Even if they were out looking for people without headlights on, and that seems to be somewhat trivial, I think the issue in this case is, one, were they off? And if they were, does that justify a stop of any nature?

And I know a lot of people think that its maybe unusual to have two cars involved in a minor stop, but as is often the case when one officer makes a traffic stop, another officer almost always comes on as a backup where they are available, and just for officer safety purposes obviously.

THE COURT: Okay. Thank you.

MR. MORRIS: Thank you.

THE COURT: Mr. Field.

MR. FIELD: Well, the first thing I would like to do is just correct a few factual statements and perceptions. First, the whole analysis that you've heard here is the type of analysis that would be used in an evidentiary hearing for a criminal prosecution whether evidence would be admissible. All [14] this discussion about the steps of reasonable stop and so on, these cases are all involving could use evidence in a criminal prosecution. And that's not what this case is about. This is a 1983 claim. This is a civil damages case. And all those cases have nothing to do with what we're here about.

THE COURT: Well, they do establish the constitutional line, right?

MR. FIELD: For a seizure. This is not a seizure case.

THE COURT: Isn't that the same constitutional line whether it's in the context of a criminal evidentiary or violations of a civil right?

MR. FIELD: If that's what I was accusing them of. I'm not accusing them of that. That was the second point is, you noticed that Attorney Morris repeatedly and carefully said that I was alleging this was about an unlawful seizure, and I'm not. The Fourth Amendment protects citizens from unreasonable searches and seizure. This is a search case. It's not a seizure case. I'm not complaining about the fact that they stopped him. I'm not complaining about the fact they arrested him. They — the factual basis for their actions were not correct. In other words, Mr. Morris represented to you that I concede that his license was expired. I do not — I do not concede that. I concede that the dispatcher told the police officer that, but it wasn't expired. What happened was —

[15] *THE COURT:* Well, I mean, there's a driver's license in the record that shows an expiration date before the date of the incident.

MR. FIELD: True. And that —

THE COURT: I know his story is it got extended he thought, but is there any dispute that it was in fact expired?

MR. FIELD: Yes. Legally I say his license — if the issue in this case was — if this was a criminal prosecution

against him for having an expired license, if that was the issue, I'm confident I would win that in Michigan state court.

In other words, this man had a driver's license, the term of the driver's license ended on his birthday in 2005. His license was suspended before that because he got too many points or don't know exactly what it was.

THE COURT: He had a ticket late.

MR. FIELD: It was nothing big.

After his birthday in 2005 when the license ran out, he went through the process with the state to get his license reinstated. And so his license was reinstated by the State of Michigan. Now, they mistakenly didn't send him a new plastic card, but that doesn't mean that his license is expired. That's their mistake not his.

But, again, I'm not arguing that, because I'm not suing these police officers because they stopped this man. That could be a perfectly innocent mistake by a good officer [16] doing his job that that all could happen. That's not what this case is about.

This case is about two officers who conspired together, we think with a third officer, to frame this man. There's — you know, there's a lot more facts in this case that will come out at trial. I don't think they are necessarily important at this point in the case, but just to give you the flavor of it. There's a third car that comes

on the scene and honks at these police officers that passes, and what we think happened was was that KVET —

THE COURT: I'm happy to hear your theory, but here is the thing: This is summary judgment, and if the facts are important to defeating summary judgment, then they are important today, and they have to be in the record in an admissible way. I mean, you can't bring up stuff today and say, Well, this will come out at trial, unless it's already in the factual record.

MR. FIELD: Well, it is in the factual record because it's in the video.

THE COURT: All right.

MR. FIELD: I mean, that third car is in the video. It's in Officer Jackson's testimony that he just came off a one- or two-year session as an undercover cop for KVET. These things are in the record.

THE COURT: Well, then it's your obligation to point [17] them out to me, then.

MR. FIELD: But — all right. Then I am.

THE COURT: That's good.

MR. FIELD: There is a third car that comes by and honks, which is bizarre action, we believe it was a KVET cop working with these two police officers. We think that

they went after him as part of a prearranged plan, and they stopped him. But I'm not pinning my case on that. This case is very simple. It's based on 42 U.S.C. 1983 that says that a citizen of these United States has a cause of action against an individual — and I sued two individuals; I didn't sue Kalamazoo Township, I sued two men — who under color of state law, acting as representing themselves to be police officers, as in fact they are, deprived that citizen of a federally protected right. And the federally protected right is the Fourth Amendment right to be free of unreasonable searches.

Now, what I allege the unreasonable search to be is the planting of evidence for the purpose of framing a witness. I cant — mean, it's — usually when you would argue about what an unreasonable search would be, you know, you would talk about the issues Attorney Morris talked about, things like, Well, did he have probable cause to make a stop? You know, how — far how much search was allowed? And so on and so forth. This is so far out of the ballpark, these two officers planted these two pills at the scene for the purpose of framing this [18] man. And there's a whole host of evidence backing that up. I have an eyewitness who filmed it. You can see there's video evidence of them dropping the pills on the ground. The witness saw them drop the pills on the ground, There — in the video police officers tried to entrap this guy, and to intimidate him. They go up to the neighbor and say, "did you see him throw the pills on the ground?" Did you see it in the film the neighbor says, "We saw you throwing them on the ground." They go back and they tell my client, "Oh, gr the next door

saw you throwing them on the ground." When, of course, that's not what he said. We know it because we see it in the video.

Where did the pills come from? Where did the pills come from? They came from the police. Now, that's another fact I would like to bring to your attention. The police officers — if you look at that video, Officer Jackson walks around and pretends like he doesn't know what the pills are. He says, "Oh, they look like they are hydrocodone," which is the trade name, generic name for Vicodin. And he says, "I'm going to go over to the hospital and confirm this." So he drives over to Borgess Hospital — I've been to the emergency room there many times — he's out of the car as shown on, the video, you can clock it on the video, he's gone for three minutes. From where he's parked to the door, you could barely walk fast from his car to the door in three minutes.

[19] The last time I was in the emergency room in Kalamazoo, I waited five hours to see a doctor. We're supposed to believe that in three minutes he got from his car — with his mic off by the way; he turned his mic off — that he walked to the emergency room, that he found a doctor and got back to his car, and the doctor was able to confirm by looking at these pills they were Vicodin. I mean, the whole story is preposterous.

THE COURT: The three minutes is quick, but it probably helps to walk into an emergency room with a uniform and badge. I bet they don't wait five hours even if you do.

MR. FIELD: Maybe not, that's true, but three minutes is ridiculous.

Then we ask him: Who is it? Wouldn't you get the person's name? Oh, I can't remember his name. Well, was it a man or a woman? It was a man. Was he tall or short? Medium height. Was his hair light or dark? You know, it was so obviously evasive, the trier of fact will have no problem knowing that Officer Jackson is making this all up.

The simple fact here is — and this is the thing that I think I want to impress on you — but for two very fortuitous events, but for the fact that my client happened, just happened by the grace of God, by the fortune beyond anything any reasonable person could expect, he just happened to have a prescription for the drug that these two police officers tried [20] to frame him with.

And secondly, that an eyewitness is standing there who is willing to come forward and testify against the police to say that they saw the police drop them, not him. Other than that, my client would be in jail right now. The possession of Vicodin is — you know, this is a serious offense. They were going to charge him with this, and be would be in jail right now.

THE COURT: You know, it may be lucky for your guy, but isn't it lucky for the defense too, because where is the constitutional violation if in fact they never ultimately acted on it?

MR. FIELD: The constitutional violation — and that appears to be the crux of the case, and so I want to — if I can read this to you — the Fourth Amendment says —

THE COURT: What are you reading? Oh, you're reading the Fourth Amendment?

MR. FIELD: The Fourth Amendment to the United States Constitution, that's the federal right my 1983 claim is based on, "The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures shall not be violated."

I submit that the constitutional violation occurred and was done the moment they planted the evidence and accused him of that being his. Then it's over. His constitutional [21] right has been violated. They don't get to say, Well, you know, we got caught before we actually charge you. I mean, if they charged him, I would be bringing a malicious prosecution claim. But they don't get — I mean, it's a bizarre idea, with all due respect to the Court, to say that if a police officer who has planted evidence and accused an innocent person of possession of an unlawful substance, if they get caught in mid course, that they should be able to go, Oh, you know, we didn't charge him, so we get away with it. To me that's a bizarre idea that I can't accept as a citizen.

THE COURT: Isn't that, though, what the Supreme Court and circuit courts around the country have said

for years, police can and routinely do, whether it's good policy or not, engage in all kinds of ruses if they have an otherwise valid basis to stop or arrest a person? They are constantly using interrogation techniques that suggest to the suspect that they know more than they think they do. There's cases that say police can lie to a suspect.

MR. FIELD: Than these officers did.

THE COURT: But, I mean, isn't that a problem? I mean, your reading of the Fourth Amendment, you know, back in the 1700s might be fair game, but how can you say that that's what it means today?

MR. FIELD: Because the damages I'm claiming are not — I'm not — I'm not alleging that they charged him — and [22] I want to comment on that decision in a moment — but I'm not alleging that they did something wrong by arresting him or stopping him. What they did that was wrong was they conducted an unreasonable search, and that search was completed when they planted the evidence. And they can't get out of that by not charging him.

Now, if this were a criminal prosecution — if this were a criminal prosecution and I — and let's say they didn't plant the evidence but we're arguing about whether they had a right to stop him, then you would get into all of those evidentiary issues under Miranda and all those other cases about whether or not — the fruit of the poisonous tree and all that. That's not what

this case is. My client has a right to not be a victim of an unreasonable search, and the search was over when they planted the evidence. And no more needs to take place. They could — they could come in and say they are sorry and it doesn't matter. They did it. And that's what my 1983 claim is based on.

Now, the other thing I just want to bring to your attention is, the record shows that when they finally told my client what it is they were charging him — or what it was, what the pills were, the police officer said, Well, they are Vicodin, and my guy kind of snickered and said, Why would I — I just bought a bottle of Vicodin. I paid good money for one. Why would I throw that on the ground? I mean, what are you [23] talking about? Vicodin?

Anyway, the police officers — this is a very interesting fact to me — they said, "Do you have a prescription for it?" Ande said, "Yes." Did they ask him to see it? No. Now, if you actually —

THE COURT: Did he have it with him? I mean, I rarely —

MR. FIELD: No, he didn't have it with him.

THE COURT: I wouldn't expect him to carry it.

MR. FIELD: No, but with all due respect, if I'm a police officer and I stop somebody and I look in his pocket and I find pills and I say, "What are those?" And

he says, "Oxycontin," and I say, "Do you have a prescription for those?" And he says, "Yes," I'm not going to take his word for it. I'm going to say, "Jeez, I really have to see the prescription."

I mean, all they need to do is go to his house or go to the pharmacy where it was issued to follow up. They didn't do that. They didn't care.

The second thing they didn't do was, he had these other pills — you know, probably a plastic capsule with sugar water in it, these male enhancement pills that he bought — and they had those tested. They sent them to the State Crime Lab to make sure that they were — that they were nothing, and that's what it came back. They didn't have the Vicodin pills tested, which I found very probative in this case. And the [24] reason they didn't have them tested is because — remember, he said he had a prescription, he said that they — you know, they weren't his, so theoretically they didn't know what they were. But they didn't have them tested. The reason they didn't have them tested is because they knew what they were. They were Vicodin that they had thrown on the ground. They knew exactly what it was. That's why they didn't need to have it tested.

So what you have in this case basically is, I think, very powerful evidence of two police officers who were attempting to frame an innocent person. And the legal question I think is simple. It's not all this Terry stop or,

you know, qualified immunity. It's none of that stuff. It's just simply what I put in my brief: 1983 says a citizen has a civil action against someone who under color of state law deprives hire of a federally guaranteed right, and the federally guaranteed right I'm asserting in this case is the right to be free from an unreasonable search, and I say that it is an unreasonable search to plant evidence. It's that simple, Thank you, Your Honor.

THE COURT: All right. Thank you.

Any rebuttal?

MR. MORRIS: Yes, just briefly, Your Honor, if I may.

Just so the record is clear, you know, Count II of plaintiff's Complaint does allege Fourth Amendment violations based upon an unreasonable search and seizure, so I take it to [25] mean from plaintiff's arguments today that he is withdrawing his seizure claim. If it's only a search claim, what I don't understand is how the planting of evidence, which I think for the purposes of this motion I assumed constitutes a search, it may constitute unreasonable behavior if it happened, it may be something else, a tort of some kind, I don't know, but it's not a search. We all know what the general definition of a search is and how that's been interpreted by the courts.

I was going to argue with regard to the seizure issue, but I guess I don't have to, the notion that the

dispatcher told the officers that his license was expired. I think the record — my brief, I think, does cite a case that says an officer can rely on, for the purposes of probable cause, what a dispatcher tells him.

And the argument, I think, that there was some framing going on really doesn't have anything to do with the legal issue in this case because I think I've assumed — I think I have to assume for the purposes of this motion that the cop dropped the pill on the ground and tried to blame it on the plaintiff. But I don't think it matters to the determination of whether or not the Fourth Amendment was violated because — well, he was seized with probable cause, but that's not an issue anymore, and there was no search. The only search that occurred is of the car and of his person. I admit that that occurred. But I don't hear him saying that was a violation of [26] the Fourth Amendment. I hear him trying to squeeze this alleged fact that the cop dropped the pill on the ground to frame him into the notion of this is a search. It's a non sequitur for me. It's not a search. It might be something else, but it's not a search. Thank you.

THE COURT: Anything else from either counsel?

MR. FIELD: Just to fallow up with a rhetorical question; What is a search, then? If they charged him with the crime because they found the pills on the ground, if it's not a search, what is it? To just say its not a search, I don't know what it is, to me is a complete legal non sequitur. If hers going to say it's something

else, then I can address that. But it clearly is a search. They are the — they said that they were accumulating, that they were acquiring evidence. That's what a search is.

MR. MORRIS: A search is — you have to have a reasonable expectation of privacy in the area where a search occurs. If the pills are on the ground, whether they got there because the plaintiff dropped them or because the cop threw them on the ground, the plaintiff doesn't have any reasonable expectation of privacy in pills laying on the ground. He's got it on his person, he's got it in his home, he's got it ostensibly in his car until something else happens, but he doesn't have it in pills laying an the ground. That's why it's not a search.

[27] THE COURT: Okay. Well, I appreciate the argument. I think, frankly, that the legal issues are pretty straightforward, but I come out with it differently than the plaintiff does. Let me just go ahead and give a bench ruling right now, and that will stand as the opinion of the Court.

This is the defendant's motion for summary judgment, and I note, as both counsel have, I think, that the state claim, which is one of two claims in the Complaint, was dismissed effectively by the plaintiff's response brief, so that was simply given up. And that leaves the federal claim.

The Fourth Amendment claim, search and seizure, in the Complaint limited today to — well, I would say

the search is or even more particularly the attempt to plant evidence in the pursuit of a conspiracy to frame an innocent citizen. I think that the Fourth Amendment claims that the plaintiff tried to put forward were — the one that he's sticking with today — are not viable under existing law. And I will break it down somewhat more than the plaintiff did, because I think that a fair reading of the Complaint left some of these open.

First of all, the initial stop and then the subsequent putting the person in the back of the car, whether that was an arrest or not we'll get to in a minute. I think that the Terry stop was entirely proper based on the headlights that the plaintiff did not have on, even though it was dark, as I recall after 10:00. And I think the video clearly shows that [28] those headlights were not on, and I don't hear the plaintiff today disputing that. It was a proper traffic stop in the first instance.

The next thing is what about putting that person, Mr. Papierz, in the back seat of the cruiser? Was it an arrest or was it just a continued detention in a Terry stop? Frankly, on this record I think it was an arrest. I went back while counsel was looking and checked the record again on top of what we talked about, and there is evidence, at least from the plaintiff's testimony on page 58 of his deposition, that he was in fact cuffed. And I think an ordinary citizen who is cuffed and put in the back seat of a cruiser without the ability to move, at least being told by one of the officers you're under arrest, I'm reading you your Miranda rights, is certainly, from any objective point of view, concluding that he's not free to go. He's under arrest.

The question then is: Was there probable cause for that arrest? At the time of the arrest, I think there plainly was. The officers believed at the time that the license was expired and more than that that it was suspended. At a minimum the suspension turned out to be wrong it appears, but it's still not clear. I hear plaintiff's argument today that it's also wrong that the license was in fact suspended. But be that as it may, at the time the officers made the decision, they had one or two bases under Michigan law to conclude with probable [29] cause that this person, Mr. Papierz, had been committing misdemeanors or arrestable offenses under state law, and so they had a proper basis to arrest him.

That leaves the initial searches to discuss, the search of Mr. Papierz's person and then the subsequent search of his car. And I think the record is quite clear that at least for the search of the person, Mr. Papierz gave consent initially that would, in any case, have been a proper basis for the policy to do that, either under the principles of the Terry stop, or once the arrest came down, on that basis. And the car is subject to search under the traditional Terry stop principles since it's entirely possible that the car is going to be returned to the person knowing that the person will return to the car on his own. And more than that, once the arrest was made as a search incident to a lawful arrest.

These cases are cited in the briefing here, but an example would be United States against Campbell from the Sixth Circuit, 2007, 486 F.3d. 949.

All of what I've said so far, I think the plaintiff, if I hear him correctly today, is saying, I'm not really contesting that. That's okay. And so that leaves this theory that citizens have a Fourth Amendment right to be free, if you will, from an attempted police plant of evidence in the course of an attempt to frame a citizen. And I think as reprehensible as that conduct would be if it occurred, either in this case or [30] any other, it's not a Fourth Amendment violation, at a minimum, when it doesn't come to fruition. And it didn't here.

And the reality is that even if it did come to fruition, I don't believe it a Fourth Amendment issue at all. I think the law would say if in fact somebody was charged and prosecuted based on falsely planted evidence in the course of an attempt to frame an innocent person, there may very well be a due process violation but not a Fourth Amendment violation.

And some examples of cases describing that would be United States against Epley, 2 F.3d. 571 from the Sixth Circuit in 1995; Frantz against Bradford, 245 F.3d. 869, both of which are cited in an unpublished Eastern District of Michigan case, United States against Melendez, Number 03-80598, 2004 U.S. Dist. LEXIS 620.

So fundamentally there's not a Fourth Amendment right of a citizen to be free from an attempt on the part of police officers to frame him. So even assuming the factual scenario that the plaintiff paints, I don't think there's a Fourth Amendment claim stated and defendants would still be entitled to summary judgment.

The added fact here, though, of course, is that there wouldn't be a Fourteenth Amendment violation either because the attempt, as plaintiff has articulated here today, or as plaintiff's counsel does, never came to fruition. And I think the case law is clear, if it doesn't come to fruition, it's not [31] a constitutional violation.

I have been on other occasions, mostly in the criminal context in suppression hearings, on occasion dismayed at the reach that police get in their ability to use ruses to use and lie to citizens, to go to a home of a citizen, for example, on an attempt to enter without a warrant, try to escalate what they think they have on the person. I don't particularly like that, to tell you the truth. I don't think in the long-run that kind of "ends justifying the means" thinking is good. I think it undermines police credibility in the minds of the public.

We wonder sometimes why do people in the minority community distrust the court and police establishments so much? Part of it — part of it could be — and I know this case does not involve a minority, so I'm just saying part of it could be that if you grow up in an apartment complex and police routinely come to the apartment complex and lie to you at the door in an effort to gain entry, you might not draw the neat distinction about whether they are lying in court when they are under oath. You just learn to distrust police. I don't like that. I think its a danger to law enforcement and to overall respect for the law. But I think the case law clearly establishes that police have that right without violating the Constitution.

You know, there's any number of cases we could cite [32] for it. There's another one from the I guess Eastern District of Michigan — it's again unpublished, but it cites published authority — Renault Fair against Kurt Jones, case number 05-CV-72036, 2007 U.S. Dist. LEXIS 4567, noting, among other things, that in this case police used a ruse to get a petitioner to come to the police station, it didn't invalidate the arrest or the subsequent search of the home. And there's a string cite of cases that talk about things that police can do in the opinion of the Supreme Court and in multiple circuits, including lying to citizens about evidence that they have, about confessions of co-defendants and that sort of thing.

Now, I don't work in the police world, I don't know what it's like to be on the street, I don't know what it's like to try to do law enforcement, but those are well-established techniques of law enforcement for better or for worse, and I think that the Constitution is not violated when they use them. And it seems to me the most you can give plaintiff on the view of the evidence here is that there was an attempt to do that that never got beyond the very early stages, the confrontation of the defendant with the very early efforts of that attempt, and that's not a constitutional violation.

This isn't part of the summary judgment opinion, because I am compelled to take the facts as they appear most favorably to the nonmoving party, I will say, though, that the evidence in the record that I've seen is quite thin. There is [33] certainly the plaintiff's fervent belief, there's no question about that. The affidavit from the

neighbor which came late is really not much of an affidavit. It basically says, I agree that whatever happened on the video happened. He doesn't step out and say anything more affirmatively than that. So it's not clear from the affidavit what he really thinks or what he would say if he came to court. At least on the summary judgment record.

The video — the video I see where the plaintiffs say here is where the cop dropped the pill. It's tough to see. You certainly can't tell what's in somebody's hand or what's on the ground. And in a probability analysis — again, we're not doing that because this is summary judgment — but Mr. Papierz has a prescription for these Vicodin, the pills are dry, I don't think anybody disputes that, it's raining outside, and he has at least one in his pocket. It seems to me more probable or at least as probable that some of the pills he was lawfully entitled to possess fell out of his pocket when he got out of the car.

But that's really beside the point for purposes of summary judgment. Even if there was the conspiracy that the plaintiff believes in process to plant evidence and frame an innocent man, it does not state a Fourth Amendment violation that's actionable under 1963 in the Court's opinion.

I will rule alternatively an qualified immunity. [34] Obviously the first prong is that there be a constitutional violation, and based on what I've already said, I don't think there is.

The second prong, though, is that the right violated be clearly established. And from what I've already said, even if there is or if some court subsequently revisits this whole line of jurisprudence and says, You know what, we don't like it either, we're going to create a new constitutional right that says part of an unreasonable search is one that's conducted or that was meant to be used or trumped up, if you will, to support a false prosecution — let's assume that happens — it's certainly not clearly established today under present law. I would say quite the contrary. The police have wide latitude to suggest to a person who is already lawfully under arrest that they have evidence, that they may not — that they may in fact not have, but to use that in the course of attempting to probe the citizen to find out what the citizen is going to say or admit to.

So I think for those reasons summary judgment on this case is appropriate for the defendants, and I'll enter an Order that says that. I'm not going to repeat everything I said here. I'll just reference the transcript. And then the case here will be over, but you can take it to wherever else you want to go.

MR. FIELD: Thank you, Your Honor. Will your oral [35] opinion be reduced to writing automatically?

THE COURT: It will be on the transcript or anybody who wants it, if you want it.

MR. FIELD: Sure.

THE COURT: But I won't do any separate written opinion.

MR. FIELD: All right. So we just have to request the transcript?

THE COURT: Yes.

MR. MORRIS: Thank you, Your Honor.

THE COURT: Anything else today? All right. Thank you.

(Proceeding adjourned at 3:50 p.m.)

* * * * *

I certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

Date: May 1, 2008

/s/

Glenda Trexler, CSR-1436, RPR, CRR